



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 21, 2011

Mr. Thomas L. Schatte  
Professional Standards Administrator  
Killeen Independent School District  
P.O. Box 967  
Killeen, Texas 76540-0967

Mr. Dennis J. Eichelbaum  
Schwartz & Eichelbaum Wardell Mehl and Hansen, P.C.  
5300 Democracy Drive, Suite 200  
Plano, Texas 75024

OR2011-03860

Dear Mr. Schatte and Mr. Eichelbaum:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 411724.

The Killeen Independent School District (the "district") received three requests from the same requestor for personnel files, grievance files, and files pertaining to legal action pertaining to nineteen named individuals. You state you are releasing some of the requested information after redactions are made in accordance with section 552.147 of the Government Code.<sup>1</sup> We note you are also withholding a Texas driver's license number under section 552.130 of the Government Code pursuant to Open Records Decision No. 684

---

<sup>1</sup>We note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. See Gov't Code § 552.147(b).

(2009).<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.117, 552.135, 552.137, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA") does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>4</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You assert FERPA applies to portions of the submitted documents. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the district. Likewise, we do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). However, we will consider your remaining arguments against disclosure of the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You raise section 552.101 in conjunction with section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. The Third Court of Appeals has concluded a written

---

<sup>2</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>3</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

<sup>4</sup>A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. See Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined for purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. See *id.* at 4. Further, in Open Records Decision No. 643, we determined an "administrator" for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator's certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You contend portions of the submitted information consist of confidential evaluations of the named teachers and administrators by the district. You inform us the named teachers and administrators at issue were certified as teachers or administrators by the State Board of Educator Certification and were acting as teachers or administrators at the time evaluations were prepared. However, you do not inform us the remaining teachers and administrators held teaching certificates or permits or administrators' certificates under chapter 21 of the Education Code at the time of the evaluations and were engaged in the process of teaching or performing the functions of an administrator at the time of the respective evaluations. See ORD 643 at 4. Accordingly, we must rule conditionally. To the extent the employees concerned held teaching certificates or permits or administrators' certificates under chapter 21 of the Education Code and were engaged in the process of teaching or performing the functions of an administrator when the information was created, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the employees did not hold teaching certificates or permits or administrators' certificates under chapter 21 of the Education Code or were not engaged in teaching or performing the functions of an administrator when the information was created, the marked information is not confidential under section 21.355 of the Education Code and may not be withheld on that basis under section 552.101 of the Government Code. Further, the remaining information at issue consists of self-evaluation forms and responses to written reprimands that were completed by the individuals at issue or does not evaluate any employee for purposes of section 21.355. Thus, we find you have failed to demonstrate how any of the remaining information at issue consists of documents evaluating the performance of a teacher or administrator for purposes of section 21.355 of the Education Code. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

We now address your arguments under common-law privacy, which is also encompassed by section 552.101 of the Government Code. Common-law privacy protects information that

is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, along with the statement of the accused. However, the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See Open Records Decision Nos. 393 (1983), 339 (1982). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

A portion of the remaining information relates to an investigation of alleged sexual harassment. Upon review, we determine the information at issue contains an adequate summary of the investigation, as well as a statement of the accused. The summary and statement are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary and statement identifying the victim and witnesses must generally be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. See *Ellen*, 840 S.W.2d at 525. We note the district has redacted the identity of the victim and the identities of some of the witnesses pursuant to FERPA. However, pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, the district must withhold the identifying information of the remaining witnesses, which we have marked, within the adequate summary and statement. Because there is an adequate summary, the district must also withhold the remaining records pertaining to the sexual harassment investigation under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.<sup>5</sup>

---

<sup>5</sup>As our ruling is dispositive with respect to the information at issue, we need not address your remaining arguments against its disclosure.

Common-law privacy also protects other types of information. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Indus. Found.*, 540 S.W.2d at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 343 (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological illnesses, convulsions or seizures, and emotional or mental distress), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim some of the remaining submitted information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Upon review, we find no portion of the remaining information is excepted under section 552.102(a). Accordingly, the district may not withhold any of the remaining information under section 552.102(a).

Section 552.102(b) of the Government Code excepts from public disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]" Gov't Code § 552.102(b). This exception further provides, however, "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. *Id.*; see also Open Records Decision No. 526 (1989). Thus, with the exception of the employees' names, courses taken, and degrees obtained, the district must withhold the submitted college transcripts under section 552.102(b) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. See Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. See Open

Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. You state, and have provided documentation showing, one of the employees concerned timely elected confidentiality for his personal information. Therefore, the district must withhold this employee's information, which we have marked, under section 552.117(a)(1) of the Government Code. However, we are unable to determine whether the remaining employees timely elected confidentiality for their personal information. Therefore, to the extent the remaining employees timely requested confidentiality under section 552.024, the district must withhold the additional information we have marked under section 552.117(a)(1).<sup>6</sup> However, any cellular telephone numbers may be withheld only if the district does not pay for the cellular telephone service. Conversely, to the extent the employees concerned did not timely request confidentiality under section 552.024 or the district pays for the cellular telephone service, the district may not withhold the remaining marked information under section 552.117(a)(1).

In summary, to the extent the employees concerned held teaching certificates or permits or administrators' certificates under chapter 21 of the Education Code and were engaged in the process of teaching or performing the functions of an administrator when the information was created, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold (1) the identifying information of the remaining witnesses, which we have marked, within the adequate summary and statement, and (2) the remaining information relating to the sexual harassment investigation under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. The district must also withhold the additional information we have marked under section 552.101 in conjunction with common-law privacy. With the exception of the employees' names, courses taken, and degrees obtained, the district must withhold the submitted college transcripts under section 552.102(b) of the Government Code. To the extent the employees concerned timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, any cellular telephone numbers may be withheld only if the district does not pay for the cellular telephone service. The remaining information must be released.

---

<sup>6</sup>Section 552.024 of the Government Code authorizes a governmental body to redact the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential without the necessity of requesting a decision from this office. Gov't Code § 552.024(c); *see id.* §§ 552.024(c-1) (requestor may appeal governmental body's decision to withhold information under section 552.024(c) to attorney general), .024(c-2) (governmental body withholding information pursuant to section 552.024(c) must provide certain notice to the requestor).